

IN THE
Supreme Court of the United States

OCTOBER TERM, 1969

No. 678

JAMES G. NASH, ET AL

Petitioners,

VS.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Civil Action 67-247

[Caption Omitted]

DOCKET ENTRIES

<i>Date</i>	<i>Material Filed</i>
April 28, 1967	Complaint Filed.
April 28, 1967	Summons & Complaint issued—delivered to U. S. Marshal for service.
May 3, 1967	Summons & Complaint returned executed on May 3, 1967 and filed.
June 26, 1967	Answer of Defendant filed — copy served by counsel.
January 18, 1968	Order dated January 17, 1968, on pre-trial hearing and consolidating C.A. 67-247, C.A. 67-248 and C.A. 67-249 for trial only and requesting counsel for defendants to file brief or or before April 1, 1968, and Counsel for Plaintiffs may file reply brief on or before May 1, 1968, filed and entered (Lynne)—Copies mailed to attorneys.
April 8, 1968	Stipulation of facts filed.
June 10, 1968	On trial before Hon. Seybourn H. Lynne, without Jury—Parties advised Court they had reached settlement in this action—Findings of Fact, Conclusions of Law and Judgment to be entered.

*Date**Material Filed*

June 12, 1968

Findings of Facts and Conclusions of Law of Hon. Seybourn H. Lynne, C.A. 67-247, C.A. 67-248 and C.A. 67-249, Southern Division, having been consolidated for trial only and submitted for final judgment by the Court, without the intervention of a jury, upon the pleadings, the order on pre-trial hearing, the stipulation of facts entered into by the parties hereto, filed.

June 12, 1968

Judgment in conformity with findings of fact and conclusions of law contemporaneously filed herewith that Plaintiff, Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr. Trust, have and recover of Defendant, United States of America, the sum of \$1,274.98, with interest as allowed by law from November 2, 1965, filed and entered (Lynne)—Copies mailed to attorneys.

June 12, 1968

Judgment in conformity with the findings of fact and conclusions of law contemporaneously filed herewith, that Plaintiffs, James G. Nash and Cecelia Nash, have and recover of Defendant, United States of America, the sum of \$59,256.75, with interest as allowed by law from January 12, 1966, filed and entered (Lynne)—Copies mailed attorneys.

June 12, 1968

Judgment in conformity with the findings of fact and conclusions of law contemporaneously filed herewith, that Plaintiff, Birmingham Trust National Bank, as Trustee of the

*Date**Material Filed*

Margaret Nash Trust, have and recover of Defendant, United States of America, the sum of \$1,273.73, with interest as allowed by law from November 2, 1965, filed and entered (Lynne)—Copies mailed attorneys,

August 12, 1968

Notice of appeal by Defendant filed—cert. copy mailed to Plaintiffs' attorneys.

September 20, 1968

Order on Motion of U. S. Attorney extending time within which record on appeal in this cause shall be filed and docketed in U. S. Court of Appeals for the Fifth Circuit for 50 days from September 21, 1968, filed and entered (Lynne)—Copies mailed to attorneys—Cert. copy mailed to clerk, U. S. Court of Appeals, New Orleans, Louisiana.

UNITED STATES COURT OF APPEALS
FOR FIFTH CIRCUIT

[Caption Omitted]

RELEVANT DOCKET ENTRIES

<i>Date</i>	<i>Material Filed</i>
November 5, 1968	Docketing Cause, etc.
November 13, 1968	Filing order of District Court extending time for filing the record.
November 13, 1968	Filing record on appeal.
November 25, 1968	Filing stipulation for consolidation of Cases No. 26928, 26929 and 26930.—approved.
December 23, 1968	Filing 10 printed copies of the appendix.
December 23, 1968	Filing of briefs for appellant.
January 23, 1969	Filing of brief for appellee.
March 18, 1969	Assigned for May 2, 1969, at Jacksonville.
May 2, 1969	Argued and submitted before Judges Tuttle, Simpson and Cassibry.
July 2, 1969	Reversed "per Tuttle, C.J."
July 31, 1969	— Judgment as mandate issued to clerk, Birmingham, Alabama, with opinion.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

ORDER ON PRETRIAL HEARING
(Filed January 18, 1968)

The above cases coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel, the following action was thereupon taken.

1. The following pleadings and amendments were allowed in each case: The complaint and the answer.

For the convenience of the parties and in the interest of justice, it is ORDERED that these actions be consolidated for purpose of trial only.

2. It was agreed by all of the parties that the following are all of the issues in controversy in these cases:

In No. 67-247 plaintiff claims of defendant a refund of income taxes for the calendar year 1961 in the amount of \$1,273.73, with interest as allowed by law; in 67-248 plaintiff claims of defendant a refund of income taxes for the year 1961 in the amount of \$59,256.75; in 67-249 plaintiff claims of defendant a refund of income taxes for the year 1961 in the amount of \$1,274.98.

In each case it is the contention of plaintiff that the Commissioner erred in including in the gross income of the taxpayer for such year the bad debt reserve set up by the partnership. The partners had organized eight separate corporations to which the assets of the partnership, including accounts receivable and the bad debt reserve, had been transferred in exchange for the stock of each corporation. (This was the practical effect of transferring the accounts receivable at their face value from which was deducted the bad debt reserve.)

Pleading the general issue, defendant contends that when the accounts receivable were transferred to the corporations, the partnership no longer had any need for the bad debt reserve.

It is agreed that the facts are capable of full stipulation. Attorneys for the plaintiff are requested to prepare a suggested stipulation and submit it to counsel for defendant for approval.

Counsel for defendant are requested to file a brief on or before April 1, 1968. Counsel for plaintiffs may file a reply brief on or before May 1, 1968.

It is therefore ORDERED by the court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above cases, unless this order be hereafter modified by order of the court.

Done, this the 17th day of January, 1968.

SEYBOURN H. LYNNE,
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

STIPULATION OF FACTS
(Filed April 8, 1968)

It is hereby stipulated and agreed by and between the parties to the above cases, for the purpose of the trial of the above entitled and numbered cases, that upon the trial of said actions the following facts are admitted and agreed upon by the parties and shall be taken as true without any evidence being produced thereon. However, other and additional proof as to any fact or matter not consistent with the statements contained in this stipulation may be introduced by either of the parties:

1. James G. Nash, Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr., Trust, and Birmingham Trust National Bank, as Trustee under the Margaret Nash Trust, were, during the calendar year 1961, partners in a partnership operating various finance businesses.

2. The partnership operated ten (10) distinct finance operations, eight (8) were conducted in Birmingham and Tuscaloosa, Alabama, and two (2) were conducted in Columbia and Greenville, South Carolina.

3. The partnership had as its taxable year the fiscal year ending January 31.

4. The partnership used the accrual method of accounting for reporting its income, and the reserve method of accounting for bad debts.

5. On June 1, 1960, the eight (8) Alabama finance companies were incorporated into eight (8) separate corporations organized under the laws of the State of Alabama.

6. As of May 31, 1960, the partnership books reflected accounts receivable in the Alabama operations in the face amount of Four Hundred Eighty-six Thousand Eight Hundred Fifty-three and 69/100 Dollars (\$486,853.69) and a reserve for bad debts applicable thereto in the amount of Seventy-three Thousand Twenty-eight and 05/100 Dollars (\$73,028.05).

7. On June 1, 1960, the partnership transferred to the eight corporations, in compliance with Section 351 of the Internal Revenue Code of 1954, as amended, the following assets and liabilities solely in exchange for the stock and securities shown below:

(A) *Sun Finance Company of Tuscaloosa, Inc.*

Cash		\$ 1,411.03
Accounts Receivable	\$53,859.27	
Less: Reserve for bad debts	8,078.89	
		45,780.38
Furniture & Fixtures	3,458.73	
Less: Reserve for Accumulated Depreciation	3,157.94	
		300.79
TOTAL ASSETS		\$47,492.20
Liabilities		11,449.55
Paid-in Surplus		1,042.65
Stock and Securities		35,000.00
TOTAL LIABILITIES & CAPITAL		\$47,492.20

(B) *Nash Finance Company of Birmingham, Inc.*

Cash	\$14,006.57	
Accounts Receivable	\$85,847.52	
Less: Reserve for bad debts ..	<u>10,852.46</u>	
		74,995.06
Furniture & Fixtures	\$23,862.77	
Less: Accumulated		
Depreciation	<u>18,956.93</u>	
		4,905.84
TOTAL ASSETS		\$93,907.47
Liabilities		16,050.85
Paid-in Surplus		856.62
Stocks and Securities		<u>77,000.00</u>
TOTAL LIABILITIES & CAPITAL ..		\$93,907.47

(C) *Sun Finance Company of Birmingham, Inc.*

Cash	\$ 1,615.44	
Accounts Receivable	\$46,885.35	
Less: Reserve for bad debts ..	<u>7,032.80</u>	
		39,852.55
Furniture & Fixtures	4,150.41	
Less: Accumulated		
Depreciation	<u>3,038.81</u>	
		1,111.60
TOTAL ASSETS		\$42,579.59
Liabilities		9,952.51
Paid-in Surplus		627.08
Stocks and Securities		<u>32,000.00</u>
TOTAL LIABILITIES & CAPITAL ..		\$42,579.59

(D) *Nash Finance Company of Tuscaloosa, Inc.*

Cash	\$ 2,363.58	
Accounts Receivable	\$69,976.11	
Less: Reserve for bad debts ..	<u>10,496.42</u>	
		59,479.69

Furniture & Fixtures	3,861.57	
Less: Accumulated Depreciation	3,611.89	
		249.68
TOTAL ASSETS		\$62,092.95

Liabilities	14,802.31	
Paid-in Surplus	290.64	
Stocks and Securities	47,000.00	
TOTAL LIABILITIES & CAPITAL		\$62,092.95

(E) *Key Finance Company of Birmingham, Inc.*

Cash	\$ 1,351.06	
Accounts Receivable	\$62,769.55	
Less: Reserve for bad debts	9,341.93	
		53,427.62

Furniture & Fixtures	3,596.78	
Less: Accumulated Depreciation	1,643.92	
		1,952.86
TOTAL ASSETS		\$56,731.54

Liabilities	13,057.40	
Paid-in Surplus	674.14	
Stocks and Securities	43,000.00	
TOTAL LIABILITIES & CAPITAL		\$56,731.54

(F) *Gray Finance Company of Birmingham, Inc.*

Cash	\$ 2,487.61	
Accounts Receivable	\$49,989.50	
Less: Reserve for bad debts	7,498.42	
		42,491.08

Furniture & Fixtures	5,225.43	
Less: Accumulated Depreciation	4,655.09	
		570.34
TOTAL ASSETS		\$45,549.03

Liabilities	10,635.08	
Paid-in Surplus	913.95	
Stocks and Securities	34,000.00	
TOTAL LIABILITIES & CAPITAL		\$45,549.03

(G) *Delta Finance Company of Tuscaloosa, Inc.*

Cash	\$ 1,647.23
Accounts Receivable	\$58,187.24
Less: Reserve for bad debts	8,728.09
	49,459.15
Furniture & Fixtures	2,578.21
Less: Accumulated Depreciation	1,765.24
	812.97
TOTAL ASSETS	\$51,919.35
Liabilities	12,314.18
Paid-in Surplus	605.17
Stocks and Securities	39,000.00
TOTAL LIABILITIES & CAPITAL	\$51,919.35

(H) *Delta Finance Company of Birmingham, Inc.*

Cash	\$ 1,226.82
Accounts Receivable	\$73,326.93
Less: Reserve for bad debts	10,999.04
	62,327.89
Furniture & Fixtures	4,671.53
Less: Accumulated Depreciation	3,044.80
	1,626.73
TOTAL ASSETS	\$65,181.44
Liabilities	15,513.84
Paid-in Surplus	667.60
Stocks and Securities	49,000.00
TOTAL LIABILITIES & CAPITAL	\$65,181.44

8. After their incorporation, the eight corporations continued to conduct the same business formerly conducted by the partnership.

9. The partnership duly and timely filed its tax return for the fiscal year ending January 31, 1961, reflecting taxable income of One Hundred One Thousand Four Hundred Fourteen and 87/100 Dollars (\$101,414.87). Taxpayers

duly reported for the calendar year 1961 their applicable distributive shares of partnership income.

10. Upon examination, the Commissioner determined that for the fiscal year ending January 31, 1961, the partnership should include as taxable income Seventy-three Thousand Twenty-eight and 05/100 Dollars (\$73,028.05), the bad debt reserve applicable to the accounts receivable transferred to the corporations. As a result of this determination, the Commissioner assessed a deficiency for the calendar year 1961 against taxpayers as follows:

James G. Nash and Cecelia Nash.....	\$48,473.14
Birmingham Trust National Bank, as Trustee for James G. Nash, Jr.....	1,042.96
Birmingham Trust National Bank, as Trustee for Margaret Nash.....	1,041.52

11. Taxpayers subsequently paid the deficiencies, plus interest to the date of payment, and timely filed a claim for refund seeking recovery of the deficiencies and interest. Upon denial of the claim for refund within six (6) months after the filing thereof, the taxpayers filed this suit within the statutory period.

Sirote, Permutt, Friend & Friedman
By Joseph S. Bluestein
Attorneys for Plaintiffs

A. Jerry Busby
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

[Caption Omitted]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(Filed June 12, 1968)

These actions were consolidated for purpose of trial only and submitted for the final judgment of the court, without the intervention of a jury, upon the pleadings, the order on pretrial hearing, and the stipulations of facts entered into by the attorneys of record for the respective parties hereto, together with the additional oral stipulation in open court that the bad debt reserves involved herein were reasonable in amount. Upon due consideration the court makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

The court finds the facts to be as stipulated in writing and orally.

CONCLUSIONS OF LAW

1. The court has jurisdiction of these actions and of the parties thereto.

2. The opinion in *Estate of Heinz Schmidt, Deceased v. Commissioner*, 355 F.2d 111 (9th Cir. 1966), is precisely in point and persuades the court to decide the issue in favor of the respective plaintiffs.

3. Plaintiff Birmingham Trust National Bank, as Trustee of the Margaret Nash Trust, is entitled to recover of defendant in the amount of \$1,273.73, with interest as allowed by law, from November 2, 1965.

4. Plaintiffs James G. Nash and Cecelia Nash are entitled to recover of defendant in the amount of \$59,256.75, with interest as allowed by law from January 12, 1966.

5. Plaintiff Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr. Trust, is entitled to

recover of defendant in the amount of \$1,274.98, with interest as allowed by law from November 2, 1965.

Separate judgments in favor of plaintiffs are to be entered herein.

Done, this the 12th day of June, 1968.

Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

BIRMINGHAM TRUST NATIONAL
BANK, as Trustee of the
Margaret Nash Trust,

Plaintiff,

Civil Action
No. 67-247

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

(Filed June 12, 1968)

In conformity with the findings of fact and conclusions of law contemporaneously filed herewith:

It is hereby ORDERED, ADJUDGED and DECREED by the court that plaintiff, Birmingham Trust National Bank, as Trustee of the Margaret Nash Trust, have and recover of defendant, United States of America, the sum of \$1,273.73, with interest as allowed by law from November 2, 1965.

Done, this the 12th day of June, 1968.

Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

JAMES G. NASH and CECELIA NASH,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action
No. 67-248

JUDGMENT

(Filed June 12, 1968)

In conformity with the findings of fact and conclusions
of law contemporaneously filed herewith:

It is hereby ORDERED, ADJUDGED and DE-
CREED by the court that plaintiffs, James G. Nash and
Cecelia Nash, have and recover of defendant, United States
of America, the sum of \$59,256.75, with interest as allowed
by law from January 12, 1966.

Done, this the 12th day of June, 1968.

Seybourn H. Lynne
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

BIRMINGHAM TRUST NATIONAL
BANK, as Trustee under the
James G. Nash, Jr., Trust,

Plaintiff,

vs.

UNITED STATES OF AMERICA.
Defendant.

Civil Action
No. 67-249

JUDGMENT

(Filed June 12, 1968)

In conformity with the findings of fact and conclusions of law contemporaneously filed herewith:

It is hereby ORDERED, ADJUDGED and DECREED by the court that plaintiff, Birmingham Trust National Bank, as Trustee under the James G. Nash, Jr. Trust, have and recover of defendant, United States of America, the sum of \$1,274.98, with interest as allowed by law from November 2, 1965.

Done, this the 12th day of June, 1968.

Seybourn H. Lynne
Chief Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 26928

JAMES G. NASH and CECELIA NASH,
Plaintiff-Appellees,
versus
UNITED STATES OF AMERICA,
Defendant-Appellant,

No. 26929

BIRMINGHAM TRUST NATIONAL BANK, AS
TRUSTEE OF THE MARGARET NASH TRUST,
Plaintiff-Appellee,
versus
UNITED STATES OF AMERICA,
Defendant-Appellant,

No. 26930

BIRMINGHAM TRUST NATIONAL BANK, as
Trustee under the James G. Nash, Jr. Trust,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

*Appeals from the United States District Court for the
Northern District of Alabama*

(July 2, 1969)

Before TUTTLE and SIMPSON, Circuit Judges, and
CASSIBRY, District Judge.

TUTTLE, CIRCUIT JUDGE: This appeal presents the issue as to the taxability of a reserve for bad debts, set up by individual taxpayers, upon their transfer of the accounts receivable owned by the taxpayers, to controlled corporations, under §351 of the 1954 Internal Revenue Code.¹

These consolidated suits were brought to recover federal income taxes for the year 1961. The taxes had been paid by the taxpayers, James G. Nash and his wife by joint return and Birmingham Trust National Bank as trustee

¹ (26 U.S.C. 1964 ed., Sec. 166.) SEC. 351. TRANSFER TO CORPORATION CONTROLLED BY TRANSFEROR. (a) [as amended by Sec. 203(a), Act of Nov. 13, 1966, P. L. 89-809, 80 Stat. 1539] *General Rule.*—No gain or loss shall be recognized if property is transferred to a corporation (including, in the case of transfers made on or before June 30, 1967, an investment company) by one or more persons solely in exchange for stock or securities in such corpo-

under the James G. Nash, Jr. Trust and under the Margaret Nash Trust. These persons were partners operating various finance institutions. In their operation they used the accrual method of accounting and the reserve method of accounting for bad debts.

On June 1, 1960, the partnership separately incorporated eight of its finance businesses in accordance with §351, supra. Among the partnership assets transferred to the controlled corporations were accounts receivable in the total amount of \$486,853.69. This represented the face amount of the accounts receivable. However, the partnership books at that time reflected a reserve for bad debts applicable to the accounts receivable in the amount of \$73,028.05. In setting up the books of account for the new corporation, the accounts receivable were shown at face value and then an item representing the proportionate part of the reserve for bad debts applicable to that particular account was deducted, purportedly then showing the net amount, which taxpayers contend represents the true or net value of the accounts.

The Commissioner determined that the partnership should have included for its final fiscal year ending January 31, 1961, the amount of the bad debt reserve, \$73,028.05, which the partnership had built up during its operation and which at the time of transfer to the corporations had not been used by specific charge-offs.

This case appears to be in all respects similar to the case of *Estate of Schmidt v. Commr.*, (9th Cir., 1968) 355 F.2d 111, in which the Court of Appeals for the Ninth Circuit reversed a decision of the Tax Court which had accepted the Commissioner's position as here urged upon us. In reversing the Tax Court, the Court of Appeals for the Ninth Circuit distinguished prior decisions of its own. *Arcadia Savings & Loan Assn. v. Commr.*, (9th Cir.) 300 F.2d 247 and *West Seattle Natl. Bank v. Commr.*, (9th Cir.) 288 F.2d 47.

ration and immediately after the exchange such person or persons are in control (as defined in section 368(c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

After carefully considering the analysis made by the Tax Court in its opinion in the Schmidt case (before reversal by the Ninth Circuit) found in 42 T.C. and its subsequent opinion in *Schuster v. Commr.*, 50 T.C. 98, we have concluded that with deference, the Commissioner's position as supported by the Tax Court is sound and should be adopted. We, therefore, respectfully disagree with the judgment and decision of the Court of Appeals announced in *Estate of Schmidt v. Commr.*, *supra*.²

The parties agree substantially to the proposition that the setting up of a bad debt reserve by a taxpayer is an accounting practice which permits him to estimate in advance what proportion or percentage of his accounts receivable will not be collected. This system of accounting is recognized by regulations and, so long as the amounts deducted from income are deemed reasonable, they are allowed as a reduction in taxable income. The parties also agree substantially that whenever the need for maintaining such reserve is no longer present, the amount carried as reserve must be covered back into income, because the taxpayer has reduced his tax during the period of accumulation of the reserve and it is only just and proper under the taxing system that it be reported as income when it has fully served its purpose. Of course, generally, this occurs only upon final liquidation or upon sale of assets in a manner that demonstrates that they are worth face value.

The government contends that this rule should be applied with its full vigor here; since it says that when the individuals transferred the accounts receivable to the eight corporations, they, the transferors, could never need such a reserve because the accounts could never become worth less than face value in their hands. The taxpayers counter with the argument that the accounts were really transferred to the newly organized corporation at the *net* value which was

² Mertens seems to agree with this treatment. See Mertens Law of Federal Income Taxation, Vol. 3, §20. 45 at page 127. See also Mertens §30.69 at page 132 where the text states: "The taxpayer should bear in mind that when all reason for maintaining a bad debt reserve ceases, the reserve then becomes an item of gross income, citing *S. Rossin & Sons, Inc. v. Commr.*, 113 F.2d (2 Cir., 1940) reversing 40 B.T.A. 1274; *Peabody Coal Co.*, 18 B.T.A. 1080 aff'd 55 F.2d 7

represented by the face of the accounts less the reserve for bad debt.

Taxpayers lay great stress upon the purpose of §351, the section that permits the transfer of property to a corporation in return for a controlling stock ownership in the corporation without a recognition of either gain or loss in the hands of the transferor. It seems to us, however, that the government's position is at least technically correct. Without attempting to be too precise about expressing our views as to the main justification of such a tax free exchange or transfer, §351 is generally thought to permit a transfer in which the economic interests are still such after the transfer as that this is merely a postponement of either gain or loss *to the transferors*, until such gain or loss is actually realized *by them*. Here, where the accounts are received by the new corporations at the basis which they had in the hands of the transferors, it would really amount to a recognition of a loss in the hands of the transferors if they were permitted to "transfer" the reserve for bad debts to the transferee corporations.

Moreover, although the actual amount of tax difference might not be large, the correctness of the government's position seems to be strengthened by the following analysis: the deductions from income by the individual transferors as they annually set aside additions to the reserve resulted in lessening of the tax at individual rates, whereas the ultimate tax paid on any part of the reserve later determined not to be needed by the corporation or upon its decision to abandon the reserve method of accounting will be taxed at corporate rates. This would not be a mere postponement of the incidence of the tax; there would also be a change of the identity of the taxpayer.

Being unable to add to the reasoning of the opinion of the Tax Court in the Schuster case, we conclude that it correctly states the law and upon the basis of the opinion in that case we conclude that the judgment in this court must be REVERSED for the entry of judgment in favor of the United States.

(7th Cir., 1931) [cert. den., 287 U.S. 605]. The subject is fully discussed on the following page in which at footnote 97(b) reference is made as to the Ninth Circuit decision in the Schmidt case.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26928

D. C. Docket No. CA 67-248

JAMES G. NASH and CECELIA NASH,
Plaintiff-Appellee.

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

*Appeal from the United States District Court for the
Northern District of Alabama.*

Before TUTTLE and SIMPSON, *Circuit Judges*, and
CASSIBRY, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 2, 1969

Issued as Mandate: July 31, 1969.

United States Court of Appeals**FOR THE FIFTH CIRCUIT**

October Term, 1968

No. 26929

D. C. Docket No. CA 67-247

BIRMINGHAM TRUST NATIONAL BANK, as**Trustee of the Margaret Nash Trust,*****Plaintiff-Appellee,*****versus****UNITED STATES OF AMERICA,*****Defendant-Appellant.******Appeal from the United States District Court for the
Northern District of Alabama.*****Before TUTTLE and SIMPSON, Circuit Judges, and
CASSIBRY, District Judge.****JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 2, 1969

Issued as Mandate: July 31, 1969.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26930

D.C. Docket No. CA 67-249

BIRMINGHAM TRUST NATIONAL BANK, as

Trustee under the James G. Nash, Jr. Trust,
Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

*Appeal from the United States District Court for the
 Northern District of Alabama.*

Before TUTTLE and SIMPSON, *Circuit Judges*, and
 CASSIBRY, *District Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of of the said District Court in this cause be, and the same is hereby, reversed.

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 2, 1969

Issued as Mandate: July 31, 1969.

Supreme Court of the United States

No. 678, October Term, 1969

JAMES G. NASH, et al.,

Petitioners,

v.

UNITED STATES

Order Allowing Certiorari. Filed January 12, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.